United States District Court
Northern District of California

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5   IN THE UNITED STATES DISTRICT COURT

6   FOR THE NORTHERN DISTRICT OF CALIFORNIA

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8   RESHMA KAMATH,   Case No. 23-cv-03533-CRB

9   Plaintiff,

10   v.   **ORDER GRANTING MOTION TO COMPEL ARBITRATION**

11   COINBASE, INC., et al.,

12   Defendant.

13   Plaintiff Reshma Kamath has sued Defendants Coinbase, Inc. and Wells Fargo

14   Bank, N.A. for damages relating to an allegedly fraudulent transaction whereby a client

15   gave Plaintiff a fraudulent check that Plaintiff deposited into her Wells Fargo bank account

16   and thereafter transferred, via Coinbase,[1] to an unknown third party, at the behest of the

17   client—resulting in a loss of $35,000[2] worth of Bitcoin. See Compl. Coinbase has moved

18   to compel arbitration and to dismiss under Rule 12(b)(1) of the Federal Rules of Civil

19   Procedure, or, in the alternative, to stay proceedings. See Mot.

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[1] Coinbase is an online platform for buying, selling, transferring, and storing cryptocurrency. See
22   Mot. (dkt. 17) at 3. Cryptocurrency "like Bitcoin, . . . is not issued by a government or a central
     bank; it is created by developers and traded over the internet." Bielski v. Coinbase, Inc., 87 F.4th
23   1003, 1007 (9th Cir. 2023). Because many traditional investment firms and banks do not sell
     cryptocurrency, many people buy and sell it through cryptocurrency exchanges. See id. Coinbase
24   is one of these exchanges; it provides users with a digital wallet, which they fund with money
     from their personal bank account. Id. Users can store currency and transfer it in and out of their
25   digital wallet. Id.
     [2] Plaintiff makes several seemingly conflicting assertions regarding her monetary loss as a result
26   of this incident. The damages Plaintiff seeks range from "$100,000 of crypto[currency]" to "over
     a million dollars of crypto[currency]." See Opp'n (dkt. 27) at 8; Compl. (dkt. 1) at 7. However,
27   Plaintiff told Coinbase—via Coinbase's "Complaint Referral Form Internet Crime Complaint
     Center"—that she made three Bitcoin transactions to a third party, totaling $35,000 in United
28   States dollars. See Compl. Ex. B. In any event, the precise monetary loss is not material to this
     order.

1   The Court finds that these motions are suitable for resolution without oral argument

2   or further briefing, pursuant to Civil Local Rule 7-1(b). As explained below, the Court

3   VACATES the hearing currently set for March 8, 2024, GRANTS Coinbase's motion to

4   compel arbitration, and STAYS this suit pending arbitration.

5   **I.   BACKGROUND**

6   Coinbase operates an online platform for buying, selling, and transferring

7   cryptocurrencies like Bitcoin, the cryptocurrency at the center of Plaintiff's claims. See

8   Nacoste Decl. (dkt 17-2) ¶ 2. Coinbase provides its online platform and services to its

9   users under the terms of a Coinbase User Agreement (UA). Id. ¶ 7. To create an account

10   and use Coinbase's services, prospective users must expressly assent to be bound by the

11   UA. Id.

12   **A.   Agreement to the UA**

13   Coinbase maintains a log of activities taken by Coinbase users. Id. ¶ 6. Coinbase's

14   records reflect that Plaintiff created a Coinbase account and accepted the Coinbase UA on

15   June 9, 2017. Id. ¶ 10, Ex. A. The 2017 UA contained an arbitration provision that

16   provided that Coinbase "may amend or modify this agreement by posting on the Coinbase

17   Site or emailing to [the user] the revised Agreement, and the revised Agreement shall be

18   effective at such time." Id. Ex. B § 8.5. Coinbase periodically updates the terms of its

19   UA. See Mot. at 3. Before the 2022 UA became active, Coinbase emailed Plaintiff on

20   January 25, 2022, to inform her that Coinbase would be updating its UA the following

21   week. See Nacoste Decl. Ex. C. The email explained that if she wanted to continue using

22   her account, she would need to accept the updated 2022 UA. See id. The email provided a

23   hyperlink to the full terms of the updated UA and encouraged users to "make sure [to] read

24   the updated User Agreement." Id. The email also flagged the 2022 UA's arbitration

25   clause. Id. ("We've reorganized and modified our User Agreement to make it more

26   understandable to [the user] and in line with our culture of clear communications.").

27   The 2022 UA was programmed to appear when users logged into their accounts in

28   February 2022. See Zia Decl. (dkt. 17-3) § 6. After the user inputted their account

1 credentials, the user was routed to a landing page that announced the update. See id. The

2 landing page presented a scroll-box containing the full text of the 2022 UA. Id. Ex. B.

3 Above the scroll box was a directive to "review and accept [the] updated terms and

4 conditions to continue using [their] Coinbase account." Id. Users could accept the terms

5 of the 2022 UA by clicking a blue "[a]ccept terms" button at the bottom of the page. Id. §

6 10.

7   Coinbase's records reveal that Plaintiff accepted the updated UA on February 28,

8 2022. See Nacoste Decl. ¶ 16, Ex. D.

9   **B.**   **Arbitration Provisions**

10   The 2022 UA included the following arbitration provision:

11   **1.1 Applicability of Arbitration Agreement.** Subject to the
terms of this Arbitration Agreement, you and Coinbase agree

12 that any dispute, claim, disagreements arising out of or relating
in any way to your access to or use of the Services or the

13 Coinbase Site, any Communications you receive, any products
sold or distributed through the Coinbase Site, the Services, or

14 the User Agreement and prior versions of the User Agreement,
including claims and dispute that arose between us before the

15 effective date of these terms (each, a "**Dispute**") will be resolved
by binding arbitration, rather than in court, except that: (1)

16 you and Coinbase may assert claims or seek relief in small
claims court if such claims qualify and remain in small claims

17 court; and (2) you or Coinbase may seek equitable relief in court
for infringement, or other misuse of intellectual property rights

18 (such as trademarks, trade dress, domain names, trade secrets,
copyrights, and patents). For purposes of this Arbitration

19 Agreement, "Dispute" will also include disputes that arose or
involve facts occurring before the existence of this or any prior

20 versions of the User Agreement as well as claims that may arise
after the termination of this User Agreement.

21 Id. Ex. E at Appendix 5 (emphasis in original).

22   The 2022 UA also contained a jury trial waiver:

23   **1.2. Waiver of Jury Trial. <u>YOU AND COINBASE HEREBY
WAIVE ANY CONSTITUTIONAL AND STATUTORY</u>**

24 **<u>RIGHTS TO SUE IN COURT AND HAVE A TRIAL IN
FRONT OF A JUDGE OR A JURY</u>. You and Coinbase are**

25 **instead electing that all Disputes shall be resolved by
arbitration under this Arbitration Agreement, except as**

26 **specified in the subsection entitled "Applicability of
Arbitration Agreement" above. There is no judge or jury in**

27 **arbitration, and court review of an arbitration award is
subject to very limited review.**

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1   Id. (emphasis in original).

2   The Preamble of the 2022 UA contained the following language:

3   **Dispute Resolution: PLEASE BE AWARE THAT
             SECTION 7 (CUSTOMER FEEDBACK, QUERIES,
4   COMPLAINTS AND DISPUTE RESOLUTION) AND
             APPENDIX 5 OF THIS AGREEMENT, CONTAIN
5   PROVISIONS GOVERNING HOW TO RESOLVE
             DISPUTES BETWEEN YOU AND COINBASE. AMONG
6   OTHER THINGS, APPENDIX 5 INCLUDES AN
             AGREEMENT TO ARBITRATE WHICH REQUIRES,
7   WITH LIMITED EXCEPTIONS, THAT ALL DISPUTES
             BETWEEN YOU AND US SHALL BE RESOLVED BY
8   BINDING AND FINAL ARBITRATION. APPENDIX 5
             ALSO CONTAINS A CLASS ACTION AND JURY TRIAL
9   WAIVER. PLEASE READ SECTION 7 AND APPENDIX
             5 CAREFULLY.**

10   Id. at Preamble. (emphasis in original).

11   Finally, the 2022 UA contained a delegation provision giving the arbitrator

12   exclusive authority to determine the enforceability of the arbitration agreement:

13   **1.6. Authority of Arbitrator.** The arbitrator shall have
             exclusive authority to resolve any Dispute, including, without
14   limitation, disputes arising out of or related to the interpretation
             or application of the Arbitration Agreement, including the
15   enforceability, revocability, scope, or validity of the Arbitration
             Agreement or any portion of the Arbitration Agreement[.]
16

17   Id. (emphasis in original).

18   **II.   LEGAL STANDARD**

19   Contracts "evidencing a transaction involving commerce" are subject to the Federal

20   Arbitration Act ("FAA"). See Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126,

21   1130 (9th Cir. 2000) (citing 9 U.S.C. § 2). The FAA provides that an agreement to

22   arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at

23   law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[A]ny party bound to

24   an arbitration agreement that falls within the scope of the FAA may bring a motion in

25   federal district court to compel arbitration." Magana v. DoorDash, Inc., 343 F. Supp. 3d

26   891, 898 (N.D. Cal. 2018) (citing 9 U.S.C. §§ 3–4).

27   When deciding whether to compel arbitration under the FAA, a court's role is

28   "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2)

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1   whether the agreement encompasses the dispute at issue." Chiron Corp., 207 F.3d at 1130.

2   If the answer to both questions is "yes," the court must enforce the arbitration agreement.

3   See id. "When deciding whether the parties agreed to arbitrate a certain matter (including

4   arbitrability), courts generally . . . apply ordinary state-law principles that govern the

5   formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944

6   (1995).

7   **III.   DISCUSSION**

8   Coinbase argues primarily that the parties agreed to delegate the issue of

9   arbitrability to the arbitrator. See Mot. at 8. Plaintiff counters that the Court, not an

10   arbitrator, must decide the issue of arbitrability, that Plaintiff did not unambiguously

11   manifest assent to Coinbase's 2022 UA, and that even if she did, the arbitration agreement

12   is unconscionable and therefore unenforceable. See Opp'n at 2–3. This order will discuss

13   (A) the issue of contract formation; (B) the issue of arbitrability; (C) Plaintiff's assertion of

14   unconscionability; and (D) Coinbase's stay request.

15   **A.   Contract Formation**

16   Plaintiff argues that she did not assent to the UA and therefore that no contract was

17   ever formed. See id. at 16. The Court will decide this issue rather than letting the

18   arbitrator decide it. See Belyea v. GreenSky, Inc., No. 20-cv-1693-JCS, 2020 WL

19   3618959, at *3 (N.D. Cal. July 2, 2020) ("The question of contract formation, however, is

20   not a delegable gateway issue.") (quoting Kum Tat Ltd. v. Linden Ox Pasture, LLC, 845

21   F.3d 979, 983 (9th Cir. 2017) ("[a]lthough challenges to the validity of a contract with an

22   arbitration clause are to be decided by the arbitrator, challenges to the very existence of the

23   contract are, in general, properly directed to the court."); Galilea, LLC v. AGCS Mar. Ins.

24   Co., 879 F.3d 1052, 1056 (9th Cir. 2018) (courts "must first make a threshold finding that

25   the document [evidencing an agreement] at least purports to be . . . a contract") (internal

26   quotation marks omitted).

27   As the party seeking to compel arbitration, Coinbase "bears the burden of proving

28   the existence of an agreement to arbitrate by a preponderance of the evidence." Lopez v.

1   Dave Inc., No. 22-cv-4160-VC, 2022 WL 17089824, at *1 (N.D. Cal., Nov. 21, 2022)

2   (internal quotation marks omitted). "Arbitration is a matter of contract." Knutson v. Sirius

3   XM Radio Inc., 771 F.3d 559, 565 (9th Cir. 2014) (internal quotation marks omitted).

4   "[A] party cannot be required to submit to arbitration any dispute which he has not agreed

5   so to submit." Id. at 565 (internal quotation marks omitted). "In determining whether the

6   parties have agreed to arbitrate a particular dispute, federal courts apply state-law

7   principles of contract formation." Berman v. Freedom Fin. Network, LLC, 30 F.4th 849,

8   856 (9th Cir. 2022). The parties here appear to agree that California law governs. See

9   Mot. at 9; Opp'n at 3. The 2022 UA has a provision stating the same. See Nacoste Decl.

10   Ex. E § 9.5 ("**Governing Law.** You agree that the laws of the State of California . . . will

11   govern this dispute . . . ") (emphasis in original).

12   Plaintiff argues that Coinbase's landing page did not provide reasonably

13   conspicuous notice of Coinbase's terms of service or its arbitration provision and that

14   Plaintiff did not manifest assent to either. See Opp'n at 14–16.[3] These are indeed the two

15   issues the Court must address. See Sellers v. JustAnswer LLC, 73 Cal. App.5th 444, 466–

16   71 (2021) (holding that the sign-in wrap at issue was not sufficiently conspicuous to bind

17   consumers to the contract); see also Berman, 30 F.4th at 856 ("[A]n enforceable contract

18   will be found based on an inquiry notice theory only if: (1) the website provides

19   reasonably conspicuous notice of the terms to which the consumer will be bound; and (2)

20   the consumer takes some action, such as clicking a button or checking a box, that

21   unambiguously manifests his or her assent to those terms.") (citing Meyer v. Uber Techs.,

22   Inc., 868 F.3d 66, 74 (2d Cir. 2017); Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1173

23   (9th Cir. 2014)).

24   There was conspicuous notice here. To open a Coinbase account, Plaintiff had to

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26   [3] Plaintiff contends that the 2022 UA is a "browsewrap" and a "sign-in wrap," Opp'n at 8, 12,
     while Coinbase contends that it is a "clickwrap agreement." Reply (dkt. 29) at 3. Even assuming
27   that the UA agreement could be both a "browsewrap" and a "sign-in wrap" (it cannot), the Court is
     inclined to agree with Coinbase on this matter, as users must click that they agree to the UA. See
28   Zia Decl. ¶ 10. The precise label does not matter; so long as the agreement gave reasonably
     conspicuous notice and Plaintiff manifested assent, there was an agreement.

1   accept the 2017 UA, which alerted users that Coinbase could "amend or modify" the

2   agreement by posting on the Coinbase website or sending an email to the user. Nacoste

3   Decl. Ex. B § 8.5. Plaintiff does not argue that she did not assent to the 2017 UA; rather,

4   Plaintiff argues that she did not assent to the updated 2022 UA. See Opp'n at 16. Plaintiff

5   was first informed of the 2022 UA on January 25, 2022, when Coinbase emailed her about

6   the upcoming changes to the UA. See Nacoste Decl. ¶14. The email was concise,

7   providing only a handful of bullet points for users to read. See id. Ex. C. One of the bullet

8   points specifically flagged the UA's arbitration clause: "**Clarity on Dispute Resolution:**

9   We've revised our arbitration to streamline the process for resolving problems you may

10 experience." Id. (emphasis in original). The email also provided a hyperlink to the full

11 terms of the updated UA and encouraged users to "make sure [to] read the entire

12 agreement." Id.

13   The email and Plaintiff's continued use of Coinbase's services is enough to

14 establish reasonably conspicuous notice and assent to the terms of the 2022 UA. See

15 Sadlock v. Walt Disney Co., No. 22-CV-09155-EMC, 2023 WL 4869245, at *12 (N.D.

16 Cal. July 31, 2023) (holding user unambiguously manifested assent to a subscriber

17 agreement by continuing to use website following an email of the update to the terms and

18 conditions); In re Facebook Biometric Info. Priv. Litig., 185 F. Supp. 3d 1155, 1167 (N.D.

19 Cal. 2016) (concluding that email regarding updates to the user agreement and continued

20 use is enough for notice and assent); In re Uber Techs., Inc., No. ML 18-2826 PSG (GJSx),

21 2019 WL 6317770, *4 (C.D. Cal. Aug. 19, 2019) ("Courts have found that when

22 consumers receive emails such as this one [e.g., having a subject line stating that Uber had

23 updated its terms of use, including in the body that the arbitration agreement had been

24 revised, and providing a link to the updated terms], continued use of the service or product

25 constitutes assent to the updated terms"); West v. Uber Techs., No. 18-CV-3001-PSG-GJS,

26 2018 WL 5848903, at *5 (C.D. Cal. Sept. 5, 2018) (stating the same).

27   Plaintiff here received even more notice than a single email. See Zia Decl. Ex. B.

28 When Plaintiff attempted to log into her account in February 2022, she was routed to a

landing page. Id. The landing page had the following phrases in bold and in a larger font

size than the rest of the text on the page: "We're updating your User Agreement with

Coinbase" and "Coinbase User Agreement." Id. Underneath the bold text was a scroll box

containing the full text of the 2022 UA. Id. The landing page also informed users that

they could access a summary of the changes by clicking a hyperlink that directed them to

an article that depicted those changes. See id. Coinbase's landing page was therefore

conspicuous and varies from the notice in Berman, where the link to the terms and

conditions to which the user allegedly agreed was "printed in a tiny gray font considerably

smaller than the font used in the surrounding website elements . . . barely legible to the

naked eye." 30 F.4th at 856–57.

Plaintiff's unambiguous assent to the 2022 UA is further illustrated by her conduct

of clicking Coinbase's "[a]ccept terms" button. See Zia Decl. Ex. C. At the bottom of the

landing page was a bright blue button that users needed to click to accept the terms of the

UA in order to continue to use Coinbase services. See id. Ex. B ¶ 10. The blue button had

the following text inside it in bold and white font: "Accept terms." See id. That text put

Plaintiff on notice. See Peter v. DoorDash, Inc., 445 F. Supp. 3d 580, 586 (N.D. Cal.

2020) (plaintiffs on notice where "text contrasts clearly with the background and is plainly

readable"). Near the "[a]ccept terms" button was a statement informing users to "[p]lease

review and accept your updated terms and conditions to continue using your Coinbase

account." Zia Decl. Ex. B. Coinbase's records indicate that Plaintiff clicked the button on

February 28, 2022, and continued to access her Coinbase account. Id. Ex. C. Coinbase's

landing page is far superior to the websites in Berman and Sellers, which did not state that

clicking the "[c]ontinue" button manifested assent to the terms and conditions. See

Berman, 30 F.4th at 858 ("This notice defect could easily have been remedied by including

language such as, 'By clicking the Continue >> button, you agree to the Terms &

Conditions.'"); Sellers, 73 Cal. App.5th at 453 (consumer clicked "[s]tart my trial" and

only "in very small print further down the page" did the webpage state: "'By clicking

'Start my trial' you indicate that you agree to the terms of service and are 13+ years

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1   old.'").

2   Plaintiff argues that she did not manifest assent because she did not physically sign

3   the 2022 UA. See Opp'n at 11. Plaintiff also argues that Coinbase needed to provide her

4   with a "detailed application" and was required to "collect . . . [her] personal information"

5   for her electronic signature to be authentic. Id. at 17–18. Plaintiff cites no authority for

6   these assertions. Plaintiff's affirmative act of clicking "[a]ccept terms" qualifies as an

7   electronic signature under federal and California law because it is "an electronic sound,

8   symbol, or process . . . adopted by a person with the intent to sign the record." 15 U.S.C. §

9   7006(5); see Cal. Civ. Code § 1633.2(h) ("electronic signature" means an electronic sound,

10   symbol, or process attached to or logically associated with an electronic record and

11   executed or adopted by a person with the intent to sign the electronic record."). Further,

12   this Court has recognized that "[e]lectronic signatures and clicking "[a]ccept" are valid

13   means of expressing assent to a contract." Mikhah v. University of Phoenix, No. C16-

14   00901 CRB, 2016 WL 3401763, at *6 (N.D. Cal. June 21, 2016) (citing Cal Civ. Code §

15   1633.7(b)).

16   Accordingly, Plaintiff agreed to the 2022 UA. See Alfia v. Coinbase Global, Inc.,

17   No. 21-cv-8689-HSG, 2022 WL 3205036, at *2 (N.D. Cal. July 22, 2022) (holding, where

18   "Plaintiff had to click a 'check box' next to the language 'I certify that I am 18 years of

19   age or older, and I agree to the User Agreement and Privacy Policy,' with both agreements

20   accessible via hyperlink," that plaintiff had "clear notice . . . and took physical action to

21   manifest his assent.").

22   **B.   Arbitrability**

23   Plaintiff argues that the Court must determine whether a valid arbitration exists

24   before referring the dispute to the arbitrator. See Opp'n at 2. Therefore, the Court will

25   next address whether it may resolve gateway issues of arbitrability or whether an arbitrator

26   must resolve those issues.

27   **1.   Governing Law**

28   To determine who decides the question of arbitrability, the Court must first address

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1   the applicable law that governs the dispute. "[F]ederal law governs the arbitrability

2   question by default because the Agreement is covered by the FAA" except where the

3   parties have "clearly and unmistakably designated that nonfederal <u>arbitrability</u> law

4   applies." <u>Brennan v. Opus Bank</u>, 796 F.3d 1125, 1129 (9th Cir. 2015) (emphasis in

5   original). The 2022 UA does not explicitly state whether California or federal law governs

6   the question of arbitrability. <u>See</u> Nacoste Decl. Ex. E § 9.5. Because there is ambiguity as

7   to whether the question of arbitrability is governed by California law, there is not "clear

8   and unmistakable evidence that the parties agreed to apply non-federal arbitrability law."

9   <u>See</u> <u>Shierkatz RLLP v. Square, Inc.</u>, No. 15-cv-02202-JST, 2015 WL 9258082, at *5 (N.D.

10   Cal. Dec. 17, 2015) (citing <u>Brennan</u>, 796 F.3d at 1129); <u>see also</u> <u>Cape Flattery Ltd.</u>, 647

11   F.3d at 921 (holding that "courts should apply federal arbitrability law absent 'clear and

12   unmistakable evidence' that the parties agreed to apply non-federal arbitrability law.")

13   (citing <u>Kaplan</u>, 514 U.S. at 944). Therefore, the Court applies federal arbitrability law.

2.   Clear and Unmistakable Delegation

15   The "gateway" question of arbitrability asks "whether the parties have submitted a

16   particular dispute to arbitration." <u>Howsam v. Dean Witter Reynolds, Inc.</u>, 537 U.S. 79, 83

17   (2002). The parties can agree that this question, like any other, will be decided by an

18   arbitrator. <u>See</u> <u>Rent-A-Ctr., West, Inc. v. Jackson</u>, 561 U.S. 68–69 (2010); <u>see also</u> <u>Henry</u>

19   <u>Schein, Inc. v. Archer & White Sales, Inc.</u>, 139 S. Ct. 524, 530 (2019) ("[I]f a valid

20   agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a

21   court may not decide the arbitrability issue."). Courts should presume that they determine

22   arbitrability "'[u]nless the parties clearly and unmistakably provide otherwise.'" <u>Howsam</u>,

23   537 U.S. at 83 (quoting <u>AT&T Techs., Inc. v. Commc'ns Workers</u>, 475 U.S. 643, 649

24   (1986)). Clear and unmistakable evidence can be "a course of conduct demonstrating

25   assent . . . or . . . an express agreement." <u>Momot v. Mastro</u>, 652 F.3d 982, 988 (9th Cir.

26   2011) (omissions in text). Silence or ambiguity must be construed in favor of the court

27   deciding the issue of arbitrability. <u>Kaplan</u>, 514 U.S. at 945–47.

28   Coinbase here argues that the 2022 UA's delegation provision unmistakably

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1   delegates arbitrability questions to the arbitrator. See Mot. at 12. There is support in the

2   case law for that position. Other courts have found that Coinbase's arbitration provision

3   has clearly and unmistakably delegated arbitrability to an arbitrator. See, e.g., Aggarwal v.

4   Coinbase, No. 22-CV-04829-JSW, 2023 WL 4935003, at *8 (N.D. Cal. Aug. 2, 2023)

5   (interpreting Coinbase's 2022 UA and concluding that "the parties clearly and

6   unmistakably agreed to submit arbitrability issues to an arbitrator."); Donovan v. Coinbase

7   Globe., Inc., 649 F. Supp. 3d 946, 954 (N.D. Cal. 2023) (same); Flores v. Coinbase, Inc.,

8   No. CV 22-8274-MWF (KS), 2023 WL 3564756, at *1 (C.D. Cal. Apr. 6, 2023) (same).

9   And only a few months ago, the Ninth Circuit held that a substantially similar delegation

10   clause in an earlier version of Coinbase's UA was not unconscionable and required that

11   threshold disputes be resolved by an arbitrator. See Bielski, 87 F.4th at 1015.

12   　　　　A recent Ninth Circuit ruling further supports the delegation here. See Patrick v.

13   Running Warehouse, LLC, No. 22-56078, 2024 WL 542831, at *8 (9th Cir. Feb. 12,

14   2024). In Patrick, the delegation provision was attached to a "terms of use" hyperlink. Id.

15   at 2. When consumers were in the process of creating an account, they had to check a box

16   next to a statement that informed them that by creating an account, they were agreeing to

17   the "terms of use." Id. The court found that the following delegation provision clearly and

18   unmistakably delegated questions of arbitrability to the arbitrator, explaining:

19
20   　　　　　　[J]urisdictional and arbitrability disputes, including disputes
　　　　　over the formation, existence, validity, interpretation or scope of
21   　　　　　the agreement under which Arbitration is sought and who are the
　　　　　proper parties to the Arbitration, shall be submitted to and ruled
22   　　　　　on by the Arbitrator. The Arbitrator has the authority to
　　　　　determine jurisdiction and arbitrability issues as a preliminary
23   　　　　　matter.

24   Id. at 7.

25   　　　　Given the similarity of the Patrick delegation provision to the delegation provision

26   here, the Court concludes that Coinbase's delegation provision clearly delegated

27   arbitrability to the arbitrator. See id.

28   　　　　Plaintiff fails to persuade the Court that the delegation provision is unenforceable.

11

1   While Plaintiff references the "clear and unmistakable" standard for delegation in her

2   opposition, see Opp'n at 21, she fails to articulate why Coinbase does not meet it. It is

3   unclear to this Court why Coinbase's alleged "false attestations" regarding discovery and

4   Plaintiff's desire to "engage in arbitration **concurrently** together with this federal case" is

5   relevant to whether the delegation provision is enforceable. Id. at 22. (emphasis in

6   original). Plaintiff goes on to cite Burzdak v. Universal Screen Arts, Inc., No. 21-CV-

7   02148-EMC, 2021 WL 3621830, at *1 (N.D. Cal. Aug. 16, 2021)—a case that held that a

8   browsewrap agreement did not put a reasonably prudent website user on inquiry notice.

9   See id. at 23. Burzdak's holding turned on contract formation, not the enforceability of a

10   delegation provision, so it is not relevant to this issue. See id.

11   Accordingly, the Court holds that the parties clearly and unmistakably delegated

12   questions of arbitrability to an arbitrator.

C.   Unconscionability and Specificity

14   Next, the Court must assess whether a general contract principle—here, the

15   principle against enforcing unconscionable agreements—makes the delegation clause

16   unenforceable under the FAA. See Rent-A-Center, 561 U.S. at 71–74.

17   Courts may refuse to enforce an unconscionable contract or a specific clause within

18   a contract, or they may limit the application of any unconscionable clause. See Cal. Civ.

19   Code § 1670.5(a). "California's 'unconscionability standard is, as it must be, the same for

20   arbitration and nonarbitration agreements.'" Poublon v. C.H. Robinson Co., 846 F.3d

21   1251, 1260 (9th Cir. 2017) (quoting Sanchez v. Valencia Holding Col, LLC, 61 Cal. 4th

22   899, 912 (2015)).

23   "[T]he party opposing arbitration bears the burden of proving . . .

24   unconscionability." Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC, 55

25   Cal. 4th 223, 236 (2012). That party "must demonstrate that the contract as a whole or a

26   specific clause in the contract is both procedurally and substantively unconscionable."

27   Poublon, 846 F.3d at 1260. Procedural unconscionability and substantive

28   unconscionability "need not be present in the same degree." Id. (quoting Sanchez, 61 Cal.

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1   4th at 910). Instead, "there is a sliding scale." Id. "[T]he more substantively oppressive

2   the contract term, the less evidence of procedural unconscionability is required to come to

3   the conclusion that the term is unenforceable, and vice versa." Sanchez, 61 Cal. 4th at

4   910.

5   The Ninth Circuit recently held that "to sufficiently challenge a delegation

6   provision [on unconscionability grounds, for example], the party resisting arbitration must

7   specifically reference the delegation provision and make arguments challenging [its

8   unconscionability]." Bielski, 87 F.4th at 1011. "[A] party may use the same arguments to

9   challenge both the delegation provision and arbitration agreement, so long as the party

10   articulates why the argument invalidates each specific provision." Id. The rule is

11   consistent with the approach in the Second, Third, and Fourth Circuits where if "a party's

12   challenge mentions and specifically relates to the validity of the delegation provision in its

13   opposition[,] . . . the federal court has a green light to consider those arguments." Id.

14   Plaintiff's unconscionability challenge to the delegation provision is scant—she

15   argues that there is a "high degree" of procedural and substantive unconscionability, but

16   her only support for that assertion is that Coinbase failed to obtain her "informed written

17   consent." Opp'n. at 20–21. Because there is a "low barrier to entry" to federal court for

18   unconscionability challenges, this Court will consider the procedural and substantive

19   unconscionability of Coinbase's delegation provision. See Bielski, 87 F.4th at 1010.

1.   Procedural Unconscionability

21   A determination of procedural unconscionability involves the analysis of two

22   factors: (1) oppression; and (2) surprise. Nagrampa v. MailCoups, Inc., 469 F.3d 1257,

23   1280 (9th Cir. 2006). Oppression is found when there is such an inequality in bargaining

24   power between two parties that there is no actual negotiation and a lack of meaningful

25   choice. Id. Surprise is found when the "supposedly agreed-upon terms are hidden in a

26   prolix printed form drafted by the party seeking to enforce them." Id. (internal quotation

27   marks omitted).

28   Here, the delegation provision is minimally procedurally unconscionable. Plaintiff

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13

1   makes no arguments about why the delegation provision is procedurally unconscionable.

2   She does not, for example, contend that she was an "unsophisticated layperson[s] who

3   could not have understood the delegation agreement." See Pinela v. Neiman Marcus Grp.,

4   238 Cal. App. 4th 227, 243 (2015). Thus, at most, there is only "the minimum degree of

5   procedural unconscionability that is always present with an adhesive contract." Id. at 244.

6   And because "the degree of procedural unconscionability . . . is low . . . the agreement will

7   be enforceable unless the degree of substantive unconscionability is high." See Poublon,

8   846 F.3d at 1263 (citation omitted).

9   **2.   Substantive Unconscionability**

10   Substantive unconscionability occurs when the terms of the agreement are one-

11   sided. See Little v. Auto Stiegler, Inc., 29 Cal.4th 1064, 1071 (2003). A court will refuse

12   to enforce an agreement, rather than sever the offending unconscionable provision, where

13   the agreement is "permeated" with unconscionability. Armendariz v. Found. Health

14   Psychcare Servs., Inc., 24 Cal.4th 83, 122 (2000).

15   Plaintiff's only argument on substantive unconscionability is that Coinbase failed to

16   obtain her "informed written consent," but Plaintiff offers no legal support for why

17   "written" consent is required. See Opp'n at 21. Coinbase's records show that Plaintiff

18   assented to the 2022 UA by providing her electronic signature when she clicked on a

19   clicked on a conspicuous "[a]ccept terms" button. See Zia Decl. ¶ 12, Ex. C. Plaintiff was

20   informed that by clicking the button, she was accepting to the terms and conditions of the

21   2022 UA. See id. ¶ 7. That is sufficient to demonstrate consent. See Berman 30 F.4th at

22   857 ("user's click of a button can be construed as an unambiguous manifestation of assent

23   only if the user is explicitly advised that the act of clicking will constitute assent to the

24   terms and condition of an agreement.")

25   The delegation agreement is therefore (at most) minimally procedurally

26   unconscionable and is not substantively unconscionable. Under the "sliding scale"

27   approach, see Poublon, 846 F.3d at 1260, it is valid and enforceable. Accordingly, the

28   Court concludes that the parties entered into a valid agreement and that that agreement

14

1   delegates the question of arbitrability to the arbitrator. The Court GRANTS the motion to

2   compel.

3   **D.   Stay**

4   Coinbase requests that this Court dismiss this case under Rule 12(b)(1), or, in the

5   alternative, stay this action pending completion of arbitration proceedings. See Mot. at 16.

6   Motions to compel arbitration are generally treated as motions to dismiss for lack of

7   subject matter jurisdiction under Rule 12(b)(1). See Harris v. Pac. Gas & Elec. Co., No.

8   21-CV-04096-JCS, 2022 WL 16637987, at *6 (N.D. Cal. Nov. 2, 2022).

9   The FAA provides that

> If any suit or proceeding be brought in any of the courts of the
> United States upon any issue referable to arbitration under an
> agreement in writing for such arbitration, the court in which such
> suit is pending, upon being satisfied that the issue involved in
> such suit or proceeding is referable to arbitration under such an
> agreement, **shall on application of one of the parties stay the
> trial of the action** until such arbitration has been had in
> accordance with the terms of the agreement, providing the
> applicant for the stay is not in default in proceeding with such
> arbitration.

9 U.S.C. § 2 (emphasis added). The plain language of the statute suggests that the Court

"shall" stay the action pending arbitration. See Johnmohammadi v. Bloomingdale's Inc.,

755 F.3d 1072, 1074 (9th Cir. 2014); Magana v. DoorDash, Inc., 343 F. Supp. 3d 891, 902

(N.D. Cal. 2018) (applying plain language of the statute to hold that a "stay" is required);

Lloyd v. HOVENSA, LLC., 369 F.3d 263, 269 (3d Cir. 2004) (same); see also Green Tree

Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 88 (2000) (applying "the plain language of

the statutory text" in interpreting the FAA).

The Ninth Circuit, however, has held that "notwithstanding the language of § 3, a

district court may either stay the action or dismiss it outright when, as here, the court

determines that all of the claims raised in the action are subject to arbitration."

Johnmohammadi, 755 F.3d at 1073–74. Coinbase offers no support for why the Court

should depart from the plain language of the text. Accordingly, the Court adheres to the

plain meaning of 9 U.S.C. § 2 and STAYS this suit pending arbitration.

15

IV.   CONCLUSION

For the foregoing reasons, the Court GRANTS Coinbase's motion to compel arbitration and STAYS this suit pending arbitration.

IT IS SO ORDERED.

Dated: March __5__, 2024

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CHARLES R. BREYER
United States District Judge